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ABSTRACT

This publication examines ways to teach about law in the liberal arts. This issue features a dialogue among eight social science, humanities, policy, and legal scholars, in which they discuss a wide range of viewpoints on federalism. The conversation traverses historical perspectives on federal-state relations, changes in selected public policy areas within the past several decades, the roles of Congress and the Supreme Court in helping to shape federal-state relations, and prospects for new forms of cooperation in the coming decade. The dialogue is divided into seven parts: (1) "Federalism and States' Rights"; (2) "Federalism, Values, and Morality"; (3) "Federal-State Relationships: A View from Selected Policy Areas"; (4) "The Supreme Court and Federalism"; (5) "Why Do Federal-State Relations Vary Across Policy Areas?"; (6) "Local Government and Federalism"; and (7) "The Future of Federalism." Participants in the dialogue are the scholars Michael Belknap, Michael Greve, Jennie Kronenfeld, Kathryn McDermott, Robert Nagel, Paul Posner, Denise Scheberle, and Sanford Schram. (Lists 35 resources on federalism.) (BT)

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Federalism: Reconciling National Values with States' Rights and Local Control in the 21st Century.

John Paul Ryan, Editor

American Bar Association, Chicago, IL. Public Education Div.

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Teaching about law in the liberal arts

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Federalism: Reconciling National Values with States' Rights and Local Control in the 21st Century

Part I: Federalism and States' Rights

Editor (John Paul Ryan): In a recent review, historian Eugene Genovese argues: "A shift toward states' rights has been discernible in recent decades, but within limits much narrower than those advocated by Jefferson and Jackson, not to mention Calhoun ..." Would you comment on that assessment, either from the vantage point of contemporary public policies or a historical perspective?

Sanford Schram (Bryn Mawr College/Graduate School of Social Work & Social Research): I agree with Genovese's statement that the shift to states rights in recent years is narrower than what Jackson or Calhoun advocated, but that should not minimize the intensity of the recent effort or its contradictions. In his review Genovese also noted that states' rights has been largely a rhetorical move useful for asserting ideological positions that were not necessarily about states' rights. Advocates of states' rights often were more interested in other things—such as protecting slavery as an institution, avoiding government regulation of business, etc.

In this sense, the contemporary push for states' rights has strong parallels with its questionable past. Today, conservatives seem increasingly split on issues of federalism. Some push for more decentralization, others for an expanding federal regulation of social and cultural issues, and still others (as in the case of welfare reform) argue for combining increased federal regulation with increased state autonomy. Conservative members of Congress advocate the "federalization" of crime policy, while the Chief Justice decries it. The federal government turns welfare into a block grant program with great flexibility, but it requires states to meet work quotas while imposing strict time limits and work requirements on recipients. The Congress defines marriage.

These contradictions suggest that there is something other than states' rights that is being advocated. What is really at work is the effort to win the ideological struggle over the extent to which our society will remain grounded in a particular set of values.

Kathryn McDermott (University of Massachusetts/School of Education): I agree with Sanford that there is an inconsistency where states' rights are concerned. Despite the tendency toward more autonomy for states, the federal government has also moved to limit what states can do. For example, in my own field of education, there's been a more activist federal role, which has carried over into the Bush Administration's proposals on testing and accountability. The last time we had a President Bush, the Republicans' official position on the U.S. Department of Education was that it should be abolished.

The balance between state and local authority over education has also been contested. States now assert much more control over curriculum and school accountability, to match their growing financial contribution to local education spending. In response, some local districts have argued for "local control," in ways that recall a Jeffersonian or Tocquevillean ideal of local democracy—much like the one that underlies the "states' rights" claims.

Michael Greve (American Enterprise Institute): Genovese is plainly correct. As Bob Nagel has observed, the idea that a handful of modest Supreme Court opinions foreshadow an impending return to an "antebellum jurisprudence" or the Articles of Confederation (asserted by Larry Tribe, Linda Greenhouse, Jeff Rosen, and others) tells us a lot about the American intelligentsia's dogmatically nationalist mindset, but next to nothing about the Supreme Court's federalism, or ours.

I agree that the demand for federalism has typically served other purposes. But that's true of most constitutional norms and principles (e.g., free speech, due

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process), and I don't see how it could be otherwise. A constitutional principle without an actual constituency to back it up will soon crumble. I also agree that conservative constituencies with a nominal interest in federalism have been very inconsistent. I suspect that the arrival of the Bush administration will exacerbate that tendency.

Jennie Kronenfeld (Arizona State University/Sociology): In health care (my main area of expertise) and in welfare, the granting of some autonomy to states–within broad federal guideline limits–is certainly not new. Many traditional welfare programs were set up as joint federal-state efforts in the 1930s, as was Medicaid when it was created in the mid-1960s. This was also the case with the creation of CHIP (child health insurance program), where states must follow certain rules about eligibility and benefits but may make a range of decisions about program details.

Within health policy more broadly, in the last decade we have seen much discussion of the notion of devolution of power and responsibility to the states (or to smaller units of government). Often, this has been more talk and less action, although the creation of block grants since the Reagan Presidency has moved some of the decisions about programs to the state level, with variation among the states in how they deal with other units of government.

To the extent that most of these programs assume federal funds coming into the states and federal guidelines to be followed, Genovese is probably correct in saying that the limits are much narrower than those of a traditional states' rights debate. Often, in health care, the debate becomes an issue of whether there is one Medicaid program (like Medicare) or fifty-one different ones. To study issues at a national level, from a research perspective, the variation in the joint federal-state programs complicates our ability to ask and answer important questions. From the perspective of potential users of services, it complicates the ability of a mobile population to know if services will be available to them and then to locate them. It also means that the reality of life for a person in poverty or of low income may vary greatly from state to state, given the variability in the availability and coverage of health and welfare benefit programs that help to supplement income and determine a more true standard of living.

Michael Greve: To what extent do we actually agree that "devolution," block grants, and the state and local administration of federally funded programs constitute "federalism"? My question is substantive, rather than a matter of terminology. The period Genovese wrote about featured an intense debate over "internal improvements," specifically, the extent to which the national government could fund such improvements within the states. The general assumption, shared even by Hamilton, was that the federal government could not do so. That was one of the reasons why the states remained, for a full century, genuinely independent, self-governing entities. The advent of the income tax and "cooperative federalism" changed that. Perhaps, that was all to the good. It seems unlikely, though, that we can spend and devolve our way back toward dual federalism.

Paul Posner (U.S. General Accounting Office/Federal Budget Issues): Rhetoric aside, devolution has several different meanings. If we mean complete federal divestiture of a responsibility, I am not aware of any examples of serious proposals, let alone enacted laws, since maybe the Reagan proposals. I don't even think there's a serious constituency among the states for this. For example, John Kasich and several other conservative Republicans proposed to devolve the gas tax and the highway program back to the states in 1995. There was a case to be made on economic grounds alone, since the interstate program was largely completed and the national government did not redistribute the taxes it collected from the states in any way approaching equalization. However, the proposal failed to gain interest from the states themselves, nor from other Republicans or Democrats. In fact, the same Congress that "devolved" welfare actually centralized transportation by enacting expanded federal programs along with numerous earmarked projects. So much for "true" devolution.

What seems to gain support in our system is a modest form of administrative devolution akin to what Michael Regan used to call "permissive federalism." Here, the system devolves authority to states only when the national level permits it and only when sufficient strings and accountability provisions are put in place to reassure national constituencies. Does this mean there is nothing gained for our system by such block grants as welfare reform or Medicaid waivers? Not at all, but we need to look at economic and efficiency criteria, not fundamental policy or moral claims for our answers.

Michal Belknap (California Western School of Law/University of California, San Diego, History): Genovese and Sanford Schram have identified the historical essence of disputes about federalism. States' rights has almost always been a rhetorical device used to support ideological positions that are not about states' rights at all. The most vigorous manifestations of states' rights, such as the Nullification crisis of the 1830s, the Civil War, and Massive Resistance in the 1950s, have occurred when opposition to the policies of the national government was concentrated in some geographic area, where it

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was strong enough for the opponents to control, and thus get their ideological positions endorsed by, state governments.

I think that if we are honest with ourselves, most of us would admit that our own positions on issues of federalism are very much influenced by our views on the underlying policy issues. I once wrote a book flogging the Kennedy and Johnson administrations for not intervening more in local law enforcement. I now find myself flogging Congress for enacting numerous unneeded and underenforced criminal statutes that do what I advocated then. The constitutional issues are really the same. But writing as an historian, I sympathized with the objectives of the civil rights movement and consequently wanted the federal government to take an active role. Now, speaking as a criminal law professor, I am concerned about the abuse of defendants' rights, which can result from having state and federal statutes on the same subject with different penalties. Hence, I now criticize the sort of federal intervention that I once insisted should take place.

The central federalism problem is the state demand for federal intervention.

[MICHAEL GREVE]

Robert Nagel (University of Colorado School of Law): One of the most distinctive aspects of the modern Court's federalism decisions is the extent to which they do not protect the role of states as competitors to national power. Indeed, where states have resisted the Court's constitutional interpretations, as with abortion and institutional injunctions, the Court has shown little or no respect for state institutions. In important instances, the Court has treated the exercise of state authority as deeply illegitimate. Where the Court has limited Congress's commerce power—e.g., in striking down the Gun Free School Zone Act (*U.S. v. Lopez*) and the Violence Against Women Act (*U.S. v. Morrison*), it has done so where there is no significant political pressure at the local level to regulate differently from the national statute anyway. The "no-commandeer" cases do not apply if the federal law regulates state governments along with the general population, so states have no immunity when their exemption could serve as visible alternatives to national policy. The 11th Amendment cases create no serious obstacle to enforcement of national policy.

Michal Belknap: As Bob highlights, the Supreme Court has really been fighting a sort of rear guard action against the constitutional revolution of 1937. For almost sixty years, while continuing to insist that there were federalism-based limitations on the power of Congress, the Court almost never found that they had been violated. Eventually, it became clear that Congress was all-powerful and could do whatever it wanted to do. Not surprisingly, Congress eventually became arrogant, overreaching, and sloppy.

Matters eventually reached the point where the Court probably had to draw a constitutional line and enforce it. But the cases in which the Court has done so, while fascinating to constitutional scholars because they represent such dramatic departures from the jurisprudence of the previous six decades, really have little practical significance. Their impact on efforts to control gun violence in schools or domestic violence, for example, is minimal. It is not as if the Court had ruled that only the states may regulate the market price of electricity, a decision that would have a dramatic impact on multibillion dollar disputes in which virtually everyone living on the West Coast has a strong, immediate, and personal interest. When we get that sort of decision, we will know there has been a real revolution in federalism, not a mere adjustment in the respective powers of the Supreme Court and Congress, whose significance is more theoretical than real.

Robert Nagel: It is interesting that the most sustained and vehement debate among the Justices on a federalism issue was sparked by Justice Thomas's dissent in the Term Limits decision (*U.S. Term Limits v. Thornton*). What seems to have troubled the Justices who voted in the majority was Thomas's endorsement of the view that the authority of the Constitution derives from the people in the states who ratified the document, not from the undifferentiated people of the whole nation. This debate, of course, has powerful historical associations, but its relevance to the legal issues in the case is not at all clear. In my opinion, the majority responded to Thomas's position so strongly because that position implies the possibility that state institutions have a legitimate role in defining constitutional limitations on the national government. In contrast, the metaphysics of an undifferentiated people of the whole nation leaves no space for any competition to national authority—as defined by the Supreme Court—because there is no continuing way for the people of the whole nation to speak. Their task ended with the creation of the Constitution, which, of course, is given current meaning by the Court.

I would acknowledge that the "no-commandeer" cases have some potential for sustaining competition, because they aim to preserve at least some of the sovereign status of states. Even in this line of cases, however, much of the Court's explanation has to do with objectives, such as democratic accountability, that are quite different from the older view of federalism as a system in which political competition would be a method of constraining national power.

Sanford Schram: I am reminded that, in his 1981 presidential inaugural address, Ronald Reagan remarked that the states created the federal government. Sam Beer and others were quick to take on this assertion. This story of the creation of our federal system is definitely contestable. In fact, the never-ending debates about federalism prove nothing other than that the issue cannot be resolved. There is no one strict interpretation of what federalism means and there is no one clear originating idea. That is perhaps its ingenuity.

The Court's recent refurbishing of the repudiated and anachronistic notion of state sovereign immunity, therefore, is not likely to go far. In this sense, I agree that this new federalism is a more muted and limited one, largely barring citizens from suing in court to force state compliance with federal law. Nonetheless, even this limited development does have substantive implications for state workers, clients, and program beneficiaries.

Robert Nagel: As for the argument that disputes over federalism are really dis-

putes over substantive policy questions, it is impossible not to grant much of this argument. However, pushing the point very far bothers me because of the related argument (made often in the legal academy) that the reason federalism has no true adherents is because it serves no moral values. If federalism does serve important purposes and attractive values, it might be that Americans tend to flip-flop in their support for federalism depending on the substantive issue at stake, not because they don't value federalism at all, but because other more immediate concerns trump the background concern about structure. I believe that it is rather natural, given American pragmatism, to allow concern about identifiable policy outcomes to trump more diffuse concerns about organization.

One reason, by the way, to see attractive values in federalism is precisely Sanford Schram's astute observation about how under federalism the source of constitutional authority remains unclear and undecidable, an ongoing debate rather than an unambiguous answer. Maybe I am peculiar, but I like a political system in which legal authority is subject to dispute and even founding myths are still open and being formed. I can't, however, blame most politicians for caring less about the moral aesthetics of ambiguous authority and more about achieving concrete policy reforms.

Paul Posner: The only kind of devolution that can survive in a system with centralized politics and media is a modest one. In our current system, the old dialogue justifying devolution and federalism just doesn't work. For instance, it is argued that a stronger national presence was needed, because states were nonresponsive or unable to respond to national expectations. Isn't it ironic that policy centralization has expanded concurrently with the modernization of states' capacities and political systems? In a centralized policy process, modernized and innovative state actions actually sow the seeds for further nationalization in a policy diffusion process whose pace and nationalizing properties have accelerated in recent years. The states themselves aid and abet these trends, as innovative states seek federal programs to put a floor under intergovernmental competition. Thus, the very mechanisms that were argued to be the political undergirding of a healthy federal system are transformed to promote greater policy nationalization.

Against this backdrop, I think that the debates over federalism issues have become more opportunistic in recent years. There was a discernible policy deference given to states in legislation sixty or even thirty years ago—e.g., states were exempt from Fair Labor Standards and OSHA, because federalism was one of those 'rules of the game' that were accepted by both sides. Federalism has been transformed from a valence value to a contestable value whose support varies by which interest it promotes. Once-stable alliances supporting federalism values have crumbled, whether it is conservatives on moral issues or the national business community on preemption issues. Rather than relying on presumptive support for federalism values, states and locals now have to do the retail work of seeking allies on an issue-by-issue basis, allies whose interests of the moment happen to coincide with federalism values. On one issue it might be labor unions, on another business, on a third environmentalists.

States are showing a surprising capacity to overcome barriers to collective action.

[PAUL POSNER]

I accept others' views that Court decisions help to better protect federalism values, though only at the margins and not in any central way. Might the states and federalism interests in general gain some encouragement from an emerging distinction I see between federal and national leadership on some policy issues? In areas as diverse as regional air quality standards, state sales tax harmonization, tobacco settlement, and possibly education standards, states are showing a surprising capacity to overcome purported barriers to *collective* action and agreement on common principles and standards. I understand that many of these initiatives are works in progress, but I wonder if there is something new going on here and whether it augurs well for states in embracing a voluntary approach to head off more preemptive federal standards.

Michael Greve: Paul's analysis strikes me as exactly right. (I can think of only two recent "divestiture" laws—the Prison Litigation Reform Act and the Defense of Marriage Act—neither of them what Paul has in mind). The central federalism problem is the state *demand* for federal intervention, not federal impositions or commandeering. More precisely, the laws that some states call "commandeering" wouldn't have gone on the federal books, unless more intervention-minded states had demanded them. That's been true since before the New Deal.

I agree that horizontal state agreements are becoming more common, and I'm extremely nervous about them. For the most part, these aren't Coasean bargains among sovereigns; they are extraconstitutional policy cartels. The tobacco Master Settlement Agreement (MSA), for a dramatic example, imposed a quarter trillion dollar tax hike that no responsible official ever voted for. The "collective action problem" was solved by leaving opposing states no choice but to join the MSA: their citizens were being taxed one way or the other, and joining was the only way to share in the loot. State cartels are highly problematic even when Congress signs off on them (e.g., Ozone Transport Commission); they're a menace when Congress fails to do so, as it did in the tobacco case and, earlier, with regard to the Multistate Tax Commission. That is why the Constitution unequivocally requires congressional consent. This sort of action isn't just inconsistent with federalism; as Martha Derthick says, it's the end of democratic government.

Part II: Federalism, Values, and Morality

Michael Greve: In light of the persistent, systemic interest group and state demands for centralized governance, I am not at all persuaded that the restoration of a more robust constitutional federalism is a viable option and a likely scenario. A federalist revival is most likely in the area of social and moral issues, where centralizing demands for redistribution are weakest. A "moral" federalism would require, first, a Supreme Court with a lot

more tolerance for democratic state governance on abortion, homosexual rights, and other intensely controversial issues and, second, a sustained trend toward a sharper cultural divide that runs along state lines. Cultural heterogeneity cuts in favor of federalism, because it gives some states an incentive to act as rival, independent power centers, rather than supplicants, to the national government. The 2000 election brought suggestive, though inconclusive, evidence of a deepening cultural divide, and there are some reasons to believe that increased economic homogeneity may go hand in hand with increased cultural heterogeneity among states.

Kathryn McDermott: "Moral" federalism is an appealing idea, but are any of the states internally homogeneous enough to make it work? For example, people typically think of Vermont as a "liberal" state, so it wasn't too surprising to see a law recognizing same-sex civil unions passed there. In the next statewide election, however, people who were offended by the law organized and voted out of office many of its advocates in the legislature.

Michael Greve: It depends on what "works" means. I think that most (not all) states are somewhat more homogeneous than the country at large—not with respect to the range of policy preferences, but with respect to the median voter point. By way of example: let there be a contested moral issue on which the nation divides 50:50. There will be lots of states where the voters split 80:20 and lots where the distribution is the opposite, and a few where the distribution equals the national average. Allowing the states to adopt the positions that reflect the various mixes will necessarily satisfy a larger number of voter preferences than a desperate effort to find the national median point.

My impression is that even the harsh debate in Vermont was somewhat more civil than one might expect of a national, all-or-nothing debate led by, say, Gary Bauer on one side and Barney Frank on the other, with each leading his battalions of uncompromising advocacy groups. And we may actually learn something from Vermont. Religious advocates may learn that the sky won't fall after "civil unions." Homosexual advocates may learn that not all objections to their ambitions rest on bigotry. Perhaps I'm being too sanguine, but I think the larger point—that the optimal rate of policy diffusion isn't "all at once"—is valid.

Part of the attraction of moral federalism is to allow people to sort themselves into jurisdictions to their liking. That consideration probably operates more strongly at the local level, but one can easily think of state level examples (guns, abortion, and gay marriage).

Michal Belknap: We do have one outstanding historical example of people attempting to sort themselves into jurisdictions of their liking on the basis of morality. The fate of plural marriage in Utah suggests that there are very real limits to the amount of moral diversity that at least a very large national majority will tolerate. Of course, Utah was not yet a state when this controversy arose, and indeed giving up plural marriage was the price Mormons had to pay for statehood. But I have my doubts that it would have made all that much difference had Utah been able to argue that continuing plural marriage was a matter of states' rights. Many Southerners in the 1950s considered race mixing immoral. They controlled the governments of a number of states and mounted a powerful constitutional and political campaign for retention of their peculiar principles. Moral federalism did not keep their minority values from being trampled by the national majority, just as those of the Mormons before them had been.

Sanford Schram: I am skeptical of the idea of a moral federalism. I also chafe at ideas that federalism is a religious idea or covenant. Political federalism is about protecting minorities. Creating a moral federalism would, therefore, seem to be self-defeating. A moral federalism might be one way of removing certain thorny cultural issues from the national arena. Yet it is one that creates greater opportunities for minorities to be oppressed at the state level. These minorities tend to do better at the national level, and from their perspective that is where their issues should stay.

More generally, the idea of moralizing politics at any level is troubling. While moral discourse at the state level might be less offensive than at the national level, federalism is not about promoting morality, and politics is better served not being seen as a conduit for moral regulation. Social and cultural issues deserve and need to be debated in politics. And to varying degrees, all levels of government need to make policy that ultimately has implications for promoting some values over others. Framing this as a question of morality, however, is repugnant to the better understandings of our liberal and civic republican traditions. It is bad enough that the Religious Right wants to use the White House and the Attorney General's office to legislate its understanding of morality for the country. It is not that much of an improvement to suggest that morality can best be legislated in a more decentralized way via the states. Liberty is in peril when federalism and all the other "auxiliary precautions" are put in service of moral regulation. Historically, we have promoted federalism in the name of religious, social, and political diversity. What we need today is more politics that is consistent with those better instincts in federalism, not ones that seek to use the various levels of government for moral instruction and enforcement.

Liberty is in peril when federalism is put in the service of moral regulation.

[SANFORD SCHRAM]

The preoccupation with a moral state is a diversion. Rather than focus on the injustices of our political economy, something that federalism has always been vulnerable to neglecting, President Bush would have us believe that the problems of poverty in our society stem from a lack of morality. A government that is focused on morality is neglecting the issues of economic disadvantage that today are best handled, in large part, at the national level.

Michael Greve: The next federalism case that really matters won't be about the 11th Amendment, "clear statements," preemption, or anything else constitutional lawyers normally associate with "federalism." It will be about abortion. On abortion (and related matters), the conservative Justices are only one vote short, and it

is distinctly possible that they will obtain that vote over the next few years. If that happens, Bob, will it force you to qualify your powerful analysis of federalism's near-irreversible implosion?

Robert Nagel: I certainly agree that important federalism questions have to do with defining the permissible scope of state regulation on morals. One reason, as Michael Greve has been pointed out, is that people in different states may have (or may develop, as people move) different moral viewpoints, but another is that the right to debate and to decide crucial questions of public morality is what gives public discourse weight. States can't be serious centers of political life if they can't debate and decide significant moral issues. Therefore, if a fifth vote on the Court were to tip the balance in favor of overruling *Roe v. Wade*, I would have to rethink my thesis that we are in fact experiencing a continuing and inexorable implosion of power into the central government.

As delighted as I would be to rethink this thesis, however, let me add two points. First, given the hysterical nationalism of "conservative" Justices in the *Casey* opinion—and given all the other evidence that the Supreme Court is more concerned with its own prestige and authority than with ideology—I do not believe that there is any realistic chance of reversing *Roe*. Second, even if a great deal of regulatory authority over abortion were to be returned to the states (which the undue burden test makes conceivable, although that standard's application in the partial-birth abortion case makes even this modest change seem unlikely), the national government would retain concurrent authority over vital moral issues, including abortion regulation. I am inclined to think that attention to such issues at the national level would dwarf the discourse at the state and local level, and so I doubt that political decision making at the state level would gain significant stature.

Part III: Federal-State Relationships: A View from Selected Policy Areas

Editor: How have federal-state relationships changed during the past decade or two? In your opinion, why did these changes occur? Did these changes have generally positive or negative consequences for the effective implementation of the policy?

Denise Scheberle (University of Wisconsin, Green Bay/Political Science): The working relationships between federal officials tasked with overseeing state environmental programs and state officials with on-the-ground implementation responsibility have evolved under a relatively unchanged statutory framework. Most major environmental laws were passed in the 1970s—e.g., the Clean Air and Water Acts, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, etc. Congress typically established a partial-preemption framework that required states to submit programs for approval, usually by the Environmental Protection Agency. Many environmental programs provided the "carrot" of federal grants, but seldom in amounts sufficient to run state and local environmental programs.

Oversight of state programs consisted of measuring the outputs of state environmental agencies—e.g., number of inspections, enforcement actions, etc. Given the magnitude of environmental issues, the large number of programmatic responsibilities given to the EPA in a short time, and the newness of federal-state relationships, this was probably not an unreasonable way to oversee the states. However, this soon became a thorn in the side of state officials, who frequently observed that the EPA paid little attention to whether or not environmental conditions were improving. This situation was only compounded by the lack of sufficient resources given to the states and the lack of flexibility within and among environmental programs. Congress had not passed a single environmental law but a host of laws, each of which established obligations on the EPA, the states, and regulatory target groups.

The fate of plural marriage in Utah suggests the very real limits of any moral federalism.

[MICHAL BELKNAP]

In the mid-1990s the Clinton Administration was pushing the National Performance Review, which included a look at intergovernmental relationships and articulated the need for such a review within environmental programs. The result was the National Environmental Performance Partnership System (NEPPS), a program that allows states with approved Performance Partnership Agreements to create outcome measures for oversight review and receive more flexibility in funding. NEPPS, on paper at least, represents a fundamental change in federal-state relationships within environmental programs. Based upon the first few years of experience with NEPPS, reviews by the National Academy of Public Administration and the GAO seem mildly positive.

In a nutshell, federal-state relationships appear to have improved, but efforts to change working relationships have proceeded slowly. In my opinion, these changes represent a step in the right direction and are very consistent with community-based environmental protection, multimedia enforcement, and current efforts to look more holistically at the environment.

Jennie Kronenfeld: Because health care involves so many federal dollars and is of such intense concern to consumers, politicians tend to focus on different aspects of the area at different points in time. As a result, health care policy "trends" of the past two decades are really contradictory.

Certainly, the formal position of the Reagan Administration was devolution of power to the states. Some public health programs, which had been specific grants to state and local health departments (accompanied by mandated federal guidelines and goals that were specific to narrow health policy areas—lead control, diabetes control, specific maternal and child health programs, etc.), became block grants to the states. In those cases, states gained greater autonomy in deciding what to do, what areas to emphasize, and how to determine goals and measure success.

Yet at the same time, the federal government assumed a larger and highly regulatory role in other health areas, which was antithetical to the ideological thrust of the Reagan administration. The best example was the creation of the Diagnosis Related Groups (DRG)–based payment system for inpatient hospital care services under Medicare. Medicare always had

been a national program funded at the federal level (in contrast to Medicaid, the joint federal-state program), in which the decisions about details of payment were delegated through contracts to regionally based third-party payment groups (often, Blue Cross-Blue Shield in the early years). But the DRG legislation created new federal groups that determined the categories and applied them to care, although details of payment are still contracted. Then in the late 1980s, changes were made in the physician payment approach, and new federal commissions were created to deal with those details. Medicaid, however, has remained a joint program with a greater role for the states. This has become even truer in the last few years as a result of the enactment of the Children's Health Insurance Program (CHIP), which each state is implementing in a slightly different way.

Sanford Schram: I agree with many of the points made about how federalism is changing. There has been no real devolution, mostly just buck passing and load shedding.

In its own way welfare reform is a wondrous thing contradicting itself–asserting national power to impose mandates, while giving to the states block grants and the flexibility to decide how to meet them. The end of the welfare entitlement is significant. This is symptomatic of how the idea of a national welfare state is in real jeopardy in the United States, even as the federal government enhances its role in telling states that they must move people off welfare. This was something that the states wanted to be told, so the story is even more complicated than I allow. It does seem that we have entered an era in which the center of gravity in the political system is toward using national power to undercut the idea of progressive social policy at the national level. That is pretty ironic but also sad.

Kathryn McDermott: The federal role in education policy has grown to the point where now about 7% of all educational spending is federal dollars. This isn't a ton of money, but the federal government has also become much more assertive programmatically. At the same time, the role of states in education policy has been transformed even more fundamentally. State education departments basically used to cut checks, certify teachers, and enforce basic regulations. Now they are involved in setting standards for what children should learn, establishing tests to measure that learning, sending financial assistance to towns with weak tax bases, assisting "underperforming" schools, and administering all of the federal education programs. Even though people in local school districts don't really notice the federal role, people in state education agencies certainly do. For example, about half of the Massachusetts Department of Education's employees are in federally funded positions, doing federally mandated activities.

Why these changes have occurred is much harder to answer. Desegregation is probably a big part of the explanation, although federal enforcement of *Brown* didn't really happen until the 1965 Elementary and Secondary Education Act (ESEA) created a flow of federal dollars that could be cut off if districts were not integrated. I can list laws that expanded the federal role–the ESEA, the Education for All Handicapped Children Act (EAHCA)–later the Individuals With Disabilities Education Act, the Americans with Disabilities Act, and Goals 2000, but then I beg the question of why those laws were passed. The reasons differ. ESEA and the EAHCA could be chalked up to Great Society liberalism, ADA to advocacy by people with disabilities, and Goals 2000 to the presence in office of a Democratic ex-governor with a Democratic Congress. But Goals 2000 isn't that different from the George H. W. Bush Administration's America 2000 initiative, and the elder Bush was neither a Democrat nor an ex-governor. America 2000 came out of an Education Summit sponsored by the National Governors' Association (then headed by Bill Clinton) that sought ways to improve schools, partially in response to the Reagan Administration's *Nation At Risk* report.

Trends in federal-state relations in health care policy seem contradictory.

[JENNIE KRONENFELD]

The end of the Cold War may have something to do with the federal activism in education over the last ten years. Federal-level officials know that voters care about schools, and they no longer have the "Evil Empire" on their minds. The contrast in priorities between the first Bush Administration and the current one is just amazing–from eliminating the U.S. Department of Education to using it to push standards and accountability.

The implications for policy implementation depend on what one thinks public education should do. If you consider responsiveness to local community priorities to be the highest goal, then you hate all of this federal involvement. If you think equity of outcomes across states and regions is most important, then you are more likely to think we're headed in the right direction. If you are a state education official in charge of the assessment budget, you're wondering where the money for all of the additional testing proposed by the Bush Administration will come from.

Michal Belknap: Federal-state relations in the South (the subject of my 1987 book) are probably little different today from what they were in the period I studied–1954–70. Throughout much of that era, interracial violence was rampant in the South. Although southern authorities virtually never prosecuted it, the federal government–for a mixture of constitutional and political reasons–declined to intervene. Mounting political pressure from supporters of the civil rights movement to do something about the problem overcame this inertia in 1964–65, and the Supreme Court's 1966 decisions in *U.S. v. Price* and *U.S. v. Guest*, along with the enactment of new legislation in 1968 (18 U.S.C. 245) made federal intervention much easier. There has not been much of it, however. The reason is a growing willingness on the part of southern authorities to prosecute and southern juries to convict the perpetrators of racist violence, which began to emerge in the late 1960s because of fears of a breakdown of law and order that developed among white southerners. In the long run an even more important factor has been the 1965 Voting Rights Act, which made African Americans an important political constituency to whose wishes southern police and prosecutors are necessarily responsive. That accounts, in part at least, for the recent state prose-

cutions of Klansmen accused of high-profile racist murders committed more than thirty years ago, for which they went unpunished at the time.

More generally, there has been an immense increase in federal intervention in local law enforcement in recent decades.

The end of the Cold War may have prompted a rise in federal activism in education.

[KATHRYN MCDERMOTT]

Part of this involves federal investigation of police misconduct. There had been some of this for a number of years, and the quantitative increase since the mid-1960s is probably due to a combination of factors, which include court decisions that more broadly interpret the applicable statute, the growing rights consciousness spawned by the civil rights movement, and a recognition that the mistreatment of minorities by police triggered many of the urban race riots of the late 1960s.

But there has also been a tremendous increase in the number of statutes authorizing federal punishment of crimes, ranging from arson to domestic violence to gun possession at schools, that were once considered to be state responsibilities. These seem to have resulted mainly from the determination of members of Congress to extract political profit from identification with issues about which the public is particularly aroused, whether or not there is any real need for such laws. The willingness of Congress to so readily sanction so many interventions in what clearly would have been viewed in the early 1960s as matters properly left to the states, represents a very significant change. Among other things, this indicates that arguments based on federalism no longer have the political power they did then, at least when set up in opposition to the demands of vocal interest groups with nationwide support.

Michael Greve: What has changed is a new political consensus on a vastly expanded cooperative federalism. The Republican shift from Reagan "disentanglement" to "devolution" has produced a political consensus on the federalism that Paul Posner described so perceptively. My hunch is that this federalism has become, and will continue to become, more "permissive" and less regulatory, for three reasons: (1) much of what citizens care most about (crime, education, etc.) is now local—the federal government can't do much, except toss money on the street and call it "devolution"; (2) sharper ideological disagreements among the political parties, and states, increase the tendency to monetize those disagreements, without deciding much of anything, especially on issues where the national government must be seen to be "doing something" (education, crime, etc.); and (3) citizens, capital, and labor are increasingly mobile, and states have no way of countering the competitive threat, except to lock themselves into federally funded cartels. To compensate for increased revenue dependency, states will demand more implementation "autonomy." Under an administration run by former governors, they'll often have their way.

I do not believe that policy arrangements that separate funding and program design from day-to-day management and responsibility for results will ever "implement" anything. Increasingly, I'm beginning to suspect that that's the point. The paradigm of "our federalism" is CHIP: we toss out tens of billions of dollars and end up with more uninsured children. That's good for (some) states, for another round of recriminations (and policy studies), and for a handful of campaign commercials, but no one treats the failure as the scandal it actually is. Education "reform," anyone? When the "reforms" fail, as surely they will, whom will we blame?

Part IV: The Supreme Court and Federalism

Editor: How have the Supreme Court's decisions impacted federal-state relations in the past decade or so?

Sanford Schram: There has been the coronation of the Supreme Court as the ultimate arbiter of federalism and constitutional issues. I agree with the legal scholar Mark Tushnet who observed [before *Bush v. Gore*] that the judiciary is overrated and now it has come to be overused. Why have the Supreme Court decide the presidential election? If we ever needed an example of federal usurpation of power at the expense of the states, we now have the ultimate example from the Rehnquist Court. A conservative, federalist Court contradicts itself, exercises the privilege of judicial interpretation to an extreme degree, stands up for equal protection like it never did before, and as a result short-circuits Florida's participation in the presidential election. Now that is a powerful Court. Federalism will never be the same.

Michael Greve: The Supreme Court's federalism is a major development, not for what it has done on the ground but for what it portends. As Alexander Bickel observed, the Supreme Court's major decisions attempt to anticipate an emerging social consensus. If the desire to be seen as an engine of progress by later generations is what drives the Rehnquist Court, we haven't seen the end of judicially enforced federalism by a long stretch.

Robert Nagel: From my vantage point, the biggest change is the triumph of the doctrine of judicial supremacy. By "judicial supremacy" I mean the claim that when performing their own duties and not named as a party in any lawsuit, the other institutions of government are bound to accept the constitutional interpretations of the Supreme Court. As far as I know, this idea was never proposed by the Court except as dictum in *Cooper v. Aaron* in 1958, in response to state resistance to a school desegregation decree. Conventional legal scholarship at the time strongly questioned the claim as going far beyond anything authorized by *Marbury v. Madison*, and the Court let the matter drop until 1992 when, in *Planned Parenthood v. Casey*, the Justices condemned state legislatures that had enacted statutes resistant to (but not necessarily inconsistent with) *Roe v. Wade*. Remarkably, some important legal scholars endorsed the Court's view this time. In the 1997 case invalidating the Religious Freedom Restoration Act, *City of Boerne*, the Court audaciously extended its claim to supreme interpretive authority even as against congressional power to enforce the 14th Amendment. Since then I count at least four decisions that invoke the doctrine, now almost as a matter of routine.

To the extent the Justices of the Supreme Court accept the doctrine of judicial supremacy, they naturally view resistant thinking by state and local officials not as reason to reassess their own interpretations but as illegitimate defiance. This creates a powerful nationalizing effect, because official disagreement with the national judiciary's preferred policies becomes grounds for the Court to reassert and extend those policies. That is why abortion policy is becoming more nationalized rather than less. Moreover, to the extent that state and local officials accept the doctrine, they do not express disagreement with the judiciary's policies in their official acts and presumably inhibit even the range of their thinking and public commentary on the interpretative claims of the Court. That is why, for example, the debate among the Pennsylvania legislators who enacted the statute reviewed in *Casey* was severely circumscribed by a shared assumption that the state officers are bound by the reasoning in *Roe*. As a result, political discourse at the state and local level becomes a pale reflection of national discourse. State institutions become that much more uninteresting and unimportant.

Michael Greve: While I agree that the decisions Bob mentions are open to a judicial supremacy interpretation, they are not entirely conclusive. Leaving aside divergent interpretations of particular cases (especially *City of Boerne*), the basic dilemma and irony is this: the Supreme Court, the most nationalist among all our institutions, is the only institution capable of restoring federalism. Leaving aside the legitimacy of that enterprise, the endeavor requires an extraordinary assertion of judicial competence. The Court has to build up capital and prestige—in part, by slapping Congress in cases when the Left will applaud. I think this explains several otherwise inexplicable decisions (yes, even *Boerne*).

In this one regard, the Court's federalism really does bear comparison to the antebellum era, to the Marshall Court's aggressive attempt to cement national power without a dominant political constituency (the late John Marshall despaired of the task). The difference, of course, is that the Court's endeavor back then was in harmony with its nationalist institutional make-up, whereas a judicial supremacy–based nationalist resurrection of federalism is deeply contradictory. But is it impossible?

Michal Belknap: While I agree that invalidating the Religious Freedom Restoration Act was a rather revolutionary step (especially in light of the contrast between that ruling and the deference the Court had shown to Congress in *Katzenbach v. Morgan*), I am not sure that decisions like *Casey* really are. Was the Rehnquist Court doing anything that was qualitatively different from what the Marshall Court did in *Martin and Cohens*?

The biggest change is the triumph of the doctrine of judicial supremacy.

[ROBERT NAGEL]

If the Constitution is the supreme law of the land, which even state judges are required to follow, and if it is the role of the Supreme Court to interpret it, does the Court not necessarily have to assert supremacy over the states? Even its willingness to do so with respect to rights not clearly spelled out in the Constitution is nothing new. Is that not what the substantive due process decisions of the "Lochner era" involved? Theodore Roosevelt reacted to those by proposing to give voters the right to overturn state court rulings striking down state statutes as violations of the 14th Amendment. But he did not advocate giving voters the power to strike down U.S. Supreme Court decisions doing the same thing. Indeed, Roosevelt would have allowed the Court to overrule state voters. Although hostile to judicial power, he apparently considered it a necessary evil when used to ensure national supremacy.

Robert Nagel: One point of clarification: I was not referring to the Court's assertion of operational authority over *state* institutions, which is certainly of long standing. I was referring to the claim, quite explicit in *Casey*, that state officials breach a duty when—in exercising their own responsibilities—they act on beliefs about the Constitution that differ from the Court's judgments. Indeed, some of the rhetoric in *Casey* goes so far as to suggest that ordinary citizens should not continue to debate the abortion issue, once it was "settled" by the Supreme Court. It is one thing to acknowledge that the Court is entitled to set aside the official acts of state legislatures and the judgments of state courts and that state officials are under an obligation to obey the resulting federal judicial orders. It is quite another to claim that the enactment of those laws or the articulation of those judgments is, in the first place, illegitimate. It is one thing for the Justices to conclude that state decision makers were wrong, but quite another to say that their disagreement was illegitimate. It stretches things even further to claim that citizens' disagreement with the Court is illegitimate and a reason to insist on, or even expand, the constitutional interpretation in question. It is a sign of how far we have come that it is now so difficult to differentiate between ordinary judicial review and "judicial supremacy" as I am using the term.

Part V: Why Do Federal-State Relations Vary Across Policy Areas?

Editor: It appears that the federal role in policy areas where the states have historically held strong autonomy—education and law enforcement, in particular—is growing significantly. By contrast, in areas where the federal government has held control (environment) or where there have been strong federal-state partnerships (welfare, health care), there is a growing trend to grant the states more flexibility—in program design, spending, even assessment. Is this a reasonable generalization? Are there other or better explanatory models?

Jennie Kronenfeld: I have long been struck by the contrast between the wide and early acceptance of the principle that all children are entitled to a free public education (K–12), versus the lack of consensus for the principle that everyone is entitled to access to health care or free health insurance. I wonder if part of the difference is that, historically, the provision of free education was seen as a function of local government, whereas the debate over

universal health care has generally been combined with a debate over an increasing role for the federal government.

I am not sure it is correct to categorize the relationship in health care policy as involving strong federal-state partnerships. That is true for Medicaid but not for Medicare, which is exclusively federal if we look at programs that deliver health care services. If research is considered, however, this is federally funded (NIH, etc.) and does not flow through state and local governments, except for some special funding by CDC and some environmental health research. Similarly, the past programs of support for medical education and nursing education were more often directed to schools rather than through state and local governments.

By 1970, Congress decided that environmental protection was a federal issue.

[DENISE SCHEBERLE]

Denise Scheberle: When I think about the evolution of federal-state relationships in environmental policy over the last thirty years, I see several factors in play. First, the complexity and extent of environmental problems, as well as their media coverage, forced Congress to take an active role. Before the late 1960s, Congress had been content to let states manage their own pollution problems. Federal legislation regarding air, water, and solid waste prior to the 1970s provided states grants and technical assistance but did little in the way of creating federal standards. Beginning with the Clean Air Act of 1970, however, Congress decided that environmental protection was a federal issue. Public attention to the environment was stimulated by a number of events—the Cuyahoga River catching fire, the Santa Barbara oil spill, Rachel Carson's book *Silent Spring*, etc. But it was also the case that ideologies played a role. In the 1980s, the Reagan Administration sought to moderate the effects of environmental laws, especially the ones related to hazardous waste and Superfund. President Bush was pleased to accept credit for the 1990 Clean Air Act Amendments, largely because of their market-based approach to sulfur dioxide emissions. However, the law also placed additional requirements on states.

If the magnitude of the problem and public demand for change prompted early federal involvement, other factors seem to be connected with attempts to increase state flexibility in the last decade. The Clinton Administration advocated community-based environmental protection, Better America Bonds, and the National Environmental Performance Partnership System. President George W. Bush is likely to continue and even accelerate the devolution. Bush may certainly point to more state flexibility and more state funding as part of his compassionate conservatism agenda, but more important than any ideological position is the recognition in the environmental policy community that many of the serious remaining environmental issues are ones that are in the hands of local/state governments—e.g., land-use control for addressing nonpoint sources of pollution, urban sprawl, wetlands and habitat destruction, etc. Most states have now expanded their capacity to deal with environmental concerns. Moreover, in a recent decision regarding federal authority over isolated wetlands (*Solid Waste Agency v. U.S. Army Corps of Engineers*), the Supreme Court has signaled that there is a limit to using interstate commerce to regulate intrastate activities under environmental programs.

Michal Belknap: While the federal roles in education and law enforcement have both grown significantly, I am not sure the reasons are the same. For law enforcement they are largely ideological. For a long time, there was very strong opposition to any sort of national police force. The most vocal proponent of that point of view, ironically, was J. Edgar Hoover, the longtime director of the FBI. It gave him an excuse to keep the Bureau out of civil rights enforcement and a justification for avoiding conflicts with local police departments that might keep them from cooperating with the Bureau on matters, such as stolen car recoveries, that generated statistics that impressed Congress and ensured generous appropriations. Rampant violence against the civil rights movement and the failure of southern law enforcement to control it broke down much of the ideological opposition to federal intervention in local law enforcement and generated political pressures that forced Hoover to flood Mississippi and Georgia with agents in 1964. Events of the 1960s, in northern cities as well as in the South, convinced many people that local law enforcement often meant racist law enforcement, and that federal intervention was the only way to ensure fair treatment for African Americans. While federal dollars, from LEAA to the war on drugs, have served to increase cooperation between the national government and the states, I think the ideological change came first and was more significant in expanding the federal role in law enforcement.

In education, by contrast, Congress appropriated a lot of money to help public schools—first, because this was seen as doing something to advance American interests in the Cold War and then because, before the Vietnam War intervened, a prosperous economy had generated a large surplus. Federal dollars came with federal strings attached, and while there was a strong ideological commitment to localism in education, the desire for money to finance new programs was even stronger. At about the same time, courts in such states as California and New Jersey were undermining local control by invalidating school finance systems based on local property taxes, thereby shifting much of the responsibility for funding public education to the state level. Nobody really ever had much ideological commitment to state control of education; it was control by locally elected school boards to which people were attached. Since that was on the way out anyhow, it was easy to yield to temptation and take Washington's gold, and much easier than it would have been as late as the 1940s for Presidents and Congress to involve themselves in the formulation of education policy.

Many federal education programs, however, do not seem to have been terribly efficient, in that much of the money has helped to pay for expanding bureaucracies in local school districts and at the state level, as well as in Washington. Isn't the trend toward granting states more flexibility in such areas as welfare and the environment a reaction, in part, against this kind of inefficiency?

Kathryn McDermott: Michal raises an interesting point about the federal role in education policy. It is generally true that nobody was fighting to defend the state role from federal encroachment, because the strong commitment was to local control. The actual details are different from state to state, for a variety of historical reasons. Hawaii has no local school districts; Massachusetts has more than 300. My sense of the politics behind the ESEA of 1965 that sent the first general-purpose federal aid to schools was that the local districts generally wanted it. The state departments of education were so weak that the law actually included some funds specifically earmarked to build up their capacity. Despite the strength of local control as an ideal, as a matter of state constitutional law, education is a state responsibility, delegated to the locals. The current emphasis on standards and testing is making the actual state role much closer in practice to what it seems to be on paper.

Some federal education policy has been quite effective at doing some things. Federal law was crucial in establishing the principle that children with disabilities must be included in public schools. However, there isn't a lot of federal money behind this requirement, which makes it something of an unfunded mandate. The most conspicuous lack of success has been the "compensatory education" program that began in 1965. Until recently, the law required that the programs serve only specific children who met certain criteria, and that the services be clearly separated from, and in addition to, the general education program. Thus, for about the first thirty years of the program, kids would be pulled out of their regular classes for extra services, and evaluation of the programs emphasized compliance with regulations rather than results. More recently, schools where many kids qualify for the services can use the funds for whole-school programs. Therefore, in most districts it's not fair to say that federal money has created more bureaucracy, at least not in the sense of more staff.

Michael Greve: I think we are seeing the intergovernmentalization of nearly everything. Pendulum swings from more permissive programs to more coercive ones (or the reverse), and variations among policy sectors, are nothing new. I am reasonably confident of two generalizations. First, there *will* be swings. The predictable policy failure of a centralized program will produce calls for more "flexibility" and "autonomy" for the newly "competent states" that are "close to the people"; when the decentralized version also fails, complaints about "implementation deficits" and a "lack of accountability" will produce renewed centralization. Secondly, at the end of the day, government at all levels will have become much bigger (see Wildavsky, "Fruitcake Federalism").

In contrast to earlier decades, we apparently no longer need a rationale for federal intervention. What precisely is the "national interest" in education spending? Equity? If so, the federal funding formulas are obscene. International competitiveness? If private citizens don't respond to the huge returns on education that the labor markets offer, what makes us believe that a relative handful of federal dollars will do the job? Consider, for another example, the "100,000 COPS" program: what is the reason to believe that local communities will underinvest in law enforcement? Standard federalism analysis suggests that local investments will, if anything, be excessive, as local communities have an incentive to try to "export" crime to more lenient jurisdictions.

The two areas that seem to have escaped intergovernmentalization are the programs in which the federal government simply writes checks rather than provides services

Education is a state responsibility, delegated to local governments.

[KATHRYN MCDERMOTT]

(Social Security), and, interestingly, the revenue side. As far as I know, all the countries that practice "cooperative federalism" (Switzerland, Germany, etc.) have some form of sharing the major revenue sources. Here in the U.S., government institutions have generally remained respectful of each other's revenue sources.

Sanford Schram: The warp and woof of federalism today reflects the contemporary currents of opportunistic states' rights politics. Federalizing crime makes more sense to conservatives in an era in which state justices have become increasingly more diverse racially and ethnically and more liberal politically. Decentralizing social welfare makes more sense, because the opening to scale back the welfare state has been widened due to the successes of the propaganda campaign to discredit aid to low-income families that started in the 1970s. The Right picks its fights and maneuvers as best it can, sometimes seeking to undercut state autonomy to allow for assisted suicide, for example, while also seeking to end the federal entitlement to cash assistance for single mothers.

Overall, federalism makes more sense as ideological struggle than as a coherent design for the allocating of governmental responsibilities. Harold Laski, more than Aaron Wildavsky or Morton Grodzins, best understood the politics of federalism, even if all three recognized the political dimension.

Part VI: Local Government and Federalism

Editor: How are local governments faring in today's federalism arena? Are there instances where the federal government bypasses state governments and directly works with or funds local units? Have states become almost as distant from the needs of citizens at the local level as the federal government of a bygone era? What role have state supreme courts played in state versus local controversies over the fair delivery of public services?

Kathryn McDermott: In education, local government continues to interact more with the states, rather than directly with the federal government. The trend in state governance is toward the exertion of more control over schools, particularly by governors who realize that they are being held responsible by voters for education *and* that unless they have some power over what goes on in education they are unable to control how huge portions of state budgets are being spent.

Michal Belknap: As someone who is basically an historian, let me address a question about "today's federalism" from the perspective of an interested citizen of San Diego, a big city in the largest and most heterogeneous state in the Union (California). San Diego long bypassed the state

government of California to deal directly with one particular segment of the national government: the Navy. Indeed, from 1900 to the end of World War II, the Navy built most of the basic infrastructure of this city, including dredging a bay that was beautiful but too shallow to be of much value into a harbor that can now serve as a homeport to the largest aircraft carriers afloat. While Washington has traditionally been quite responsive to those seeking to promote the development of San Diego, the state government has not infrequently ignored this far-off backwater. The electricity crisis hit San Diego (the first place in the state to experience deregulation) almost a year before it hit the rest of the state, but action from the state capitol was quite limited until high prices (and rolling blackouts) spread to the Los Angeles suburbs and the San Francisco Bay Area.

The California Supreme Court, conscious that it is viewed as somewhat distant by much of the state, has started going "on the road." A couple of years ago the court sat for one day at my law school in San Diego. However, it has been only indirectly involved in state versus local controversies over the fair delivery of services. In California, such disputes often give rise to ballot initiatives, which in turn spawn court challenges. But in recent years there has been nothing remotely comparable to *Serrano v. Priest*, the 1971 California Supreme Court decision that required equal funding of schools throughout the state and thereby shifted much of the responsibility for financing public education from local districts to the state government.

Michael Greve: The one thing *Serrano* unquestionably caused, for good or ill, was Howard Jarvis's taxpayer revolt and Proposition 13. The most notable role of state courts in state and local service delivery has been in the area of education finance, where their records can be charitably described as mixed.

Michal Belknap: New Jersey's Supreme Court also equalized school funding in that state, fighting a long running battle with the state legislature. Of course, state supreme courts have also rendered rulings that protected local autonomy. Colorado's, for example, held unconstitutional a statewide ballot proposition designed to strike down local ordinances, in communities such as Denver and Aspen, that prohibited discrimination against homosexuals. But how activist these courts can be depends both on individual state constitutions and on how the U.S. Supreme Court interprets provisions of the federal Constitution that might be used to override state statutes and constitutional provisions governing the allocation of services.

Michael Greve: I don't think state governments have ever been "closer to the people" in the sense in which that phrase is commonly understood. For straightforward Madisonian reasons, they tend to be closer to mischievous factions. That is a menace, not a virtue (see *Publius*, The Federalist Papers). Federalism's genius is that interest group rackets at the state level are constrained by competition.

Robert Nagel: In postelection Florida, the local judges and boards seemed to me to behave more responsibly than did state-level institutions. I would especially contrast what I saw on the news that looked like sane, disciplined behavior of the local judges of all political affiliations and eth-

Local decision making may be more grounded, less abstract, more ordinary than state or federal.

[ROBERT NAGEL]

nicities with the chaotic decisions of the state supreme court. Moreover, the ways in which the state supreme court was undisciplined in its "statutory construction" were very similar to the rather wild techniques of "interpretation" indulged in by the U.S. Supreme Court in the modern era. I think that state-level courts tend to mimic—in a kind of second-rate way—the federal judiciary. This sense in turn leads to the hypothesis that decision making at the very local level may be distinctive—more grounded, less abstract, more ordinary—from decision making at both the state and national levels.

Some state supreme courts have gone very far in "reforming" public financing of state educational system (as some of you have noted), as well as state zoning systems, state prison systems, and traditional marriage laws. While many of these decisions go further than the U.S. Supreme Court, the intellectual inspiration for all of these law reform movements has been, I think, legal decisions and legal strategizing at the national level. This "activism" is another example of the intellectual similarities between state and national judiciaries. If one purpose of federalism was to allow for differences and competition, I would guess that the most important function of (large) state governments is to delegate authority to the localities, where real differences in styles of leadership continue to exist.

Michal Belknap: Bob makes a very interesting point in suggesting that the real division is between local institutions on the one hand and both state and national institutions on the other. That certainly seems to be the case with education and the courts. It is probably true of law enforcement as well: the state-based Texas Rangers represent outside interference to local communities every bit as much as does the FBI.

If it is local government decision making that is unique, and Austin and Sacramento have become just minor league Washingtons, then do we perhaps need to rethink what federalism is all about? Does anything more than history justify our focus on the division of powers and responsibilities between the national government and the states? Is it the dichotomy between distant government and government that is close to the people (and therefore more practical) that is really important? Is a Constitution that assigns a special status to Wyoming but not to Atlanta or the New York metropolitan area a bit outmoded?

Kathryn McDermott: The United States is almost unique among industrialized nations with respect to the degree of power and autonomy that local educational authorities have, and many Americans take it as a matter of faith that this is the best way to govern education. Our reliance on local control is not, however, a result of a conscious decision or judgment so much as a matter of path dependence

and incremental change. Many parts of the U.S. have had public schools and local government for longer than they've been within the jurisdiction of a state or part of the United States. As a result, although education is—as a matter of constitutional law—a state responsibility delegated to local authorities, from the local point of view it feels more like a local responsibility regulated and partially funded by state educational authorities. In contrast, many other countries had national and/or regional government structures in place long before they committed themselves to the provision of universal and free public education.

I agree with Bob that local government and its decisions are different from those of other levels of government. What we need to understand better in the context of education is whether it is different in ways that enhance or inhibit effective policy making. In Massachusetts, we are in the ninth year of implementation of a state education reform law. The underlying premise of the law was that the locals were better able than the state to know what their students needed. The state would provide additional aid to many districts that were struggling to raise revenue locally and would eliminate regulations that were based on compliance with procedures rather than with educational results. At the same time, the state would set high standards for what children should learn. School Councils were required in each school to act as advisory groups to principals, who in theory were given more power over what goes on in their schools. Only if a school's test scores on the state assessments indicated a problem would the state intervene in local curriculum and instruction decisions.

It is now looking like this premise may have been flawed. Local government isn't just "more grounded, less abstract, and more ordinary" as Bob Nagel stated, but it is also less endowed with research and development resources. Many of the smaller, rural districts in Massachusetts have been slow to implement curricula tied to the state standards, because they don't have sufficient staff to guide the process for their schools. Teachers are not necessarily experts in curriculum development, nor do they have a great deal of free time to work on new curricula. There hasn't been much assistance provided to the districts by the state, because the funding of education reform has emphasized local support rather than state government capacity. Devolution or reservation of certain policy duties to local authorities should be based on a clear understanding of local government's strengths and weaknesses—that is, grounded on empirical evidence rather than what Tocqueville said in the 19th century.

State governments have never been closer to the people, just closer to mischievous factions.

[MICHAEL GREVE]

Part VII: The Future of Federalism

Editor: What is on the horizon for "federalism" in the next decade? Which policy areas seem especially ripe for change or scrutiny in federal-state-local dynamics?

Sanford Schram: The recent history of welfare reform suggests that it is going to be hard to turn back the "devolution" of public assistance to the states. Nonetheless, federal funding for social welfare policy is likely to remain critical. This creates the ongoing possibility for the reassertion of federal authority and direction, as states still need to heed federal directives on the use of funds. For now, states have been given substantial leeway, and that is likely to continue until serious economic problems begin to overload state welfare systems and force greater reliance on the national government. When that occurs, the reassertion of federal authority is likely to occur. Until then, states will be free to move federal welfare funds around, even outside of the areas of social policy. I am very reluctant to predict how long such a trend can continue. The political campaign to "end welfare as we know it" was most successful, and it is not something that can be reversed overnight. Yet, as my comments suggest, I do think it is reversible.

Kathryn McDermott: In the next decade I expect intergovernmental conflict over education policy to increase, in the absence of events such as wars or major economic upsets that might push education off the top of people's lists of important issues. Politically, so long as education stays at the top of this list, everybody from town council members up to the President is likely to want to be seen as "doing something." This is true even for officials who don't have a lot of direct power over the schools. I first realized this during the New Hampshire primary campaign last year, when George Bush was running a political ad on Boston television stations that touted his support for phonics-based reading instruction.

I'd be happy to see a thorough rethinking of federal, state, local, and school-level roles in education policy, based on consideration of what distinctive capacities each level of government has. Strong local control doesn't make sense to me anymore, given that very few communities can fund education out of their own revenues and that very few people live their whole lives in the same community. Thus, we should want some common core of knowledge and some level of equity across communities. The role of financial equalizer has fallen to the states, but many people argue that financial inequalities between states' public schools are at least as problematic as inequalities between communities in the same state. Even though I am supportive of increased state and federal roles, I'm also aware that differences among schools make it hard to enact one-size-fits-all policies, and that many citizens prefer local control. Philosophy takes us only so far toward answering these questions. A strong dose of knowledge about how each level of government actually works is also crucial.

Michael Greve: The "Federalist Five" on the Supreme Court will get a sixth vote or, at least, a more reliable fifth vote. Before the decade is out, the Court will (1) impose limitations on the Congress's authority under the Spending Clause, most likely in an environmental case; (2) revisit the question of the national government's authority to impose limits on state and local governments that could not be enacted under the "domestic" enumerated powers; and (3) show much greater tolerance for state experimentation with "social" issues.

The National Governors' Association's vision of federalism ("give us more money, and leave us alone") will fall on harder

times. In terms of the overall intergovernmental dynamics, the budget battle is much more important than individual policy battles. If the Bush agenda succeeds in some measure, there will be much less money for state and local governments. That may lead, as it did in the late 1980s and early 1990s, to a more "coercive" form of federalism. But one cannot take this for granted, because ideological and political divisions between states have become much sharper, and that trend will continue. So long as the division also remains narrow, the only way to create new programs that affect the states is to monetize the disagreements (see e.g., pending education "reform"), but that can't be done if the money isn't there. Existing programs would probably become more coercive, but I wouldn't look for anything resembling the burst of new mandates around 1990 (Clean Air, ADA, Civil Rights Restoration).

Robert Nagel: I agree with Michael that the Court can be expected continue to innovate in its efforts to rein in national authority, especially with an increasing voting edge on federalism issues. I very much doubt, however, that these innovations, whether involving the spending power or some other provision, will have any significant impact. The opinions will be sufficiently hedged that the national government can achieve its objectives by fine-tuning its legislation. That has been the pattern of recent years. The political pressure to find a way around the Court's rulings will continue, because the underlying conditions that produce pressure for nationalization of public policy will continue unchanged: a mobile population with decreasing ties to localities, a pervasive electronic communications system, a culture with a depleted sense of confidence in its capacity to sustain deep moral disputes and divisions, and an optimistic "can do" national character that does not easily tolerate regional imperfections and deviations.

I unhappily disagree with Michael about the Court showing greater tolerance for state experimentation on social issues. I see almost no sign of that so far, and I see no reason to think that one or two new faces on the Court will make any difference on this crucial issue, when decades of appointing supposed proponents of "restraint" haven't. Institutional biases and temptations are just too strong. Indeed, I will voice the fear that over the next ten years we may see increasing use of excessive force by the national government.

Federal funding for social welfare policy will remain critical.

[SANFORD SCHRAM]

There are already a few signs that, as the nation proceeds in a path toward greater centralization, national authority comes to seem more precarious and is asserted with nervous vehemence.

Michal Belknap: I tend to agree more with Bob than with Michael about the future course of the Supreme Court. While the Court has now been engaged for about a decade in a campaign to revive federalism-based limits on the authority of the national government, the importance of its decisions has been more theoretical than practical.

I doubt that the appointment of a few Bush justices will produce the sort of dramatic change Michael predicts. I think it is highly unlikely that the Court will go beyond issuing periodic reminders to Congress that it cannot simply boss the states around with laws that apply only to them. Nor do I think the Court is likely to recreate some sphere of private economic activity that is beyond the reach of congressional authority, like that which existed under pre-1937 dual federalism, however much Justice Thomas might wish to do so. It's also highly unlikely that the Court will impose any real limitations on the spending power (its only significant attempt to do that, *United States v. Butler*, has been justly criticized as one of the worst reasoned opinions of all time).

The one qualification to my general disagreement with Michael involves the Court's expanding 11th Amendment jurisprudence. The Court does seem determined to make it increasingly difficult for those with valid claims against state governments to find a court in which to assert them, and future Bush appointees are likely to support the current majority in that endeavor. Furthermore, Congress is unlikely to try to rein in the Court, for it seldom challenges the Court on jurisdictional issues. Given the current hostility toward lawyers and the widespread feeling that there is too much litigation, it does not seem likely that there will be a popular or congressional outcry against rulings that make it more difficult to sue.

I am not quite sure what will happen with respect to state experimentation on social issues. Like Bob, I think that there will be no reversal of *Roe v. Wade*. Nor does not it seem very likely that a Bush Court will give the states free rein to adopt affirmative action programs. But what about newer issues, such as gay rights and the medical use of marijuana? I am enough of a (liberal) cynic to think that conservative justices are likely to find no constitutional problems with state laws disadvantaging homosexuals, while at the same time holding that state efforts to permit medicinal use of marijuana are preempted by federal laws [*Editor's Note:* see *U.S. v. Oakland Cannabis Cooperative, et al.*, decided May 14, 2001]. Perhaps Michael is right, though, and the Court's growing ideological commitment to federalism will prove stronger than its attachment to a conservative social agenda. We will have to wait and see.

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